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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ARMINIA PENAFLOR, Plaintiff and Respondent, v. CITY OF SAN DIEGO et al., Defendants and Appellants.	D038726 (Super. Ct. No. GIC744503)

APPEAL from an order of the Superior Court of San Diego County, S. Charles Wickersham, Judge. Reversed.

Defendants City of San Diego, Mary Dixon, Elbert Harrison and Mary Rea (collectively the City) appeal from an order granting a new trial (the order) after a jury returned a unanimous defense verdict in favor of the City on plaintiff Arminia Penaflor's complaint for unlawful employment retaliation, defamation and intentional infliction of

emotional distress.[1] Penaflor brought a new trial motion on four statutory grounds set forth in Code of Civil Procedure section 657 (discussed more fully, *post*): irregularity in the proceedings, misconduct of the jury, insufficiency of the evidence to justify the verdict, and the occurrence of an error in law.[2] The court granted the motion and ordered a new trial, but did not specify in the order its reasons for doing so as required by section 657, and no such specification of reasons was filed thereafter.

On appeal, the City of San Diego argues that to the extent Penaflor's new trial motion was based on the statutory ground that there was insufficient evidence to justify the defense verdict, the order must be reversed because the court failed to specify its reasons for granting a new trial. Penaflor concedes the order is defective as to this ground. The City also argues that none of the other three grounds (discussed, *ante*) on which Penaflor's motion was based warranted the granting of a new trial. We conclude the order must be reversed and the matter remanded with directions to enter judgment in favor of the City in accordance with the jury's verdict.

FACTUAL BACKGROUND

Penaflor started working for the City in 1996 as a full-time temporary employee in the police department clerical pool and about two years later accepted a full-time

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1 Various other claims alleged in the complaint were dismissed prior to trial and are not at issue in the instant appeal.

2 All further statutory references are to the Code of Civil Procedure unless otherwise specified.

permanent position as a clerical assistant. In January 1999, she was promoted to the position of word processing operator for the internal affairs unit of the police department.

On January 11, 2000, Penaflor transferred to the parking management division as a public information clerk. As a newly transferred employee, she was required to successfully complete a 60-day probationary period before her new position could become permanent. During that period, her new supervisor could fail her on probation with the result that she would be transferred back to her prior department and job class.

For parking citations that remained outstanding for more than 90 days, the computers at the parking management division automatically triggered a "vehicle lien" in the computers at the State of California Department of Motor Vehicles (DMV), and the registered owner would not be permitted to accomplish anything through the DMV until the lien was satisfied through payment of the fine. The computers at the parking management division were not programmed to automatically release vehicle liens on line to the DMV upon payment of parking citations. As a result, the citation fees were automatically included in DMV vehicle registration renewal bills, and San Diegans were double billed through the DMV for paid citations.

Penaflor reported the double-billing problem to her supervisor, Dixon; to the Division lead, Harrison; and to the accounting supervisor, Teresita del Rosario.

Penaflor did not successfully complete her 60-day probationary period in the parking management division. On February 25, 2000, Dixon (accompanied by Harrison) informed Penaflor that she had failed probation and that, under the personnel regulations, she had the right to return to her prior department. Dixon told Penaflor that she did not

seem to fit in well in the division and explained that although she did not have to give reasons to Penaflor, several witnesses had reported that she (Penaflor) had become irate with some customers on the telephone, she had received several complaints from customers about Penaflor's attitude and tone on the telephone, she had been openly angry with staff members who were trying to train her in office procedures, and she had refused to follow some of the procedures.

A few days later Penaflor called defendant Mary Rea, the deputy director of the parking management division, to find out why she had failed probation. Believing the double-billing activity was criminal, Penaflor tried to stop it by reporting it to internal affairs, the district attorney's office, and the FBI. She felt she was being retaliated against because she had refused to participate in the double-billing activity and had reported what she had witnessed.

On March 2, 2000, Penaflor contacted personnel analyst Alexy Rafael and told him she had been "fired." Rafael called Dixon, and then told Penaflor she had failed probation and instructed her to return to internal affairs. Penaflor called Sergeant Swiskowski, her former supervisor in the internal affairs unit, to inform him of her return. He responded by saying, "I just can't stick you in there. We didn't make any arrangements." He told Penaflor to report to police personnel.

Realizing she still had a job, Penaflor reported the next day to police personnel. Barbara Harris, Penaflor's new supervisor in police personnel, told Penaflor she was assigned to the clerical pool. Penaflor felt she was being punished again. Crying and feeling ill, Penaflor went to the Kaiser emergency room. Feeling she "couldn't go back if

I tried," Penaflor did not return to work, and she filed her lawsuit in this matter on March 6, 2000, the same day she had been directed to report back to work.

On April 3, 2000, the police department sent Penaflor a letter advising her that she had been absent from work without approval since March 6 and directing her to report to that office no later than April 11, 2000, or face discipline up to and including termination. When Penaflor failed to report back to work as directed, the administrator of police personnel sent her an "Advance Notice of Adverse Action" letter dated May 10, 2000, advising her that she was recommended for termination from her position as a word processing operator and informing her of her right to appeal and present evidence to contest the termination.

On June 6, 2000, after she failed to respond, Penaflor was sent a notice of termination, advising her that her employment with the City of San Diego was terminated, effective June 12, due to job abandonment, and informing her of her right to appeal to the civil service commission. Penaflor did not bring an administrative appeal.

PROCEDURAL BACKGROUND

At trial, Penaflor prosecuted against the City three causes of action alleged in her second amended complaint: unlawful employment retaliation (Lab. Code, § 1102.5), defamation, and intentional infliction of emotional distress. Following a six-day trial, the jury deliberated for about one hour and returned a unanimous defense verdict in favor of the City. The court thereafter entered judgment on the special verdict.

Penaflor brought a new trial motion on four statutory grounds set forth in section 657: irregularity in the proceedings, misconduct of the jury, insufficiency of the evidence

to justify the verdict, and the occurrence of an error in law.[3] The court granted her motion and ordered a new trial, but did not specify in the order its reasons for doing so, and no such specification of reasons was filed thereafter.

STANDARD OF REVIEW

"'"On appeal from an order granting a new trial, the sole question is whether the trial court abused its discretion. . . . This court makes all presumptions in favor of the order as against the verdict, and this court will reverse only if manifest abuse of discretion is shown."' [Citation.]" (*Maher v. Saad* (2000) 82 Cal.App.4th 1317, 1323.)

DISCUSSION

I.

FINDING OF INSUFFICIENT EVIDENCE TO JUSTIFY THE VERDICT AND FAILURE TO SPECIFY REASONS

The City argues that to the extent Penaflor's new trial motion was based on the statutory ground that there was insufficient evidence to justify the jury's unanimous defense verdict (§ 657), the order granting a new trial must be reversed because the court failed to specify its reasons for granting a new trial. Penaflor concedes the order is defective as to this ground, and we agree.

A. *Background*

As already noted, Penaflor brought her new trial motion on four statutory grounds set forth in section 657: insufficiency of the evidence to justify the verdict, irregularity in

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[3] In a ruling that is not at issue in the instant appeal, the court denied Penaflor's alternative motion for judgment notwithstanding the verdict.

the proceedings, misconduct of the jury, and the occurrence of an error in law. On August 3, 2001, the court issued a telephonic ruling minute order granting her new trial motion without specifying therein its reasons for doing so. No such specification of reasons was filed in any subsequent order.

In its telephonic ruling minute order granting the new trial motion, the court simply stated in part:

> "[Penaflor's] Motion for New trial is granted. After weighing the evidence, the court is convinced from the entire record, including reasonable inferences therefrom, that the jury clearly should have reached a different verdict."

Following oral argument, the court entered another minute order confirming without reasons the prior minute order granting the new trial motion.

B. *Analysis*

The court's failure to specify in its order the reasons why Penaflor's new trial motion should be granted on the ground of insufficiency of the evidence to justify the jury's unanimous defense verdict is a fatal defect on appeal as to that particular statutory ground. Section 657 provides in part:

> "The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: [¶] . . . [¶] 6. *Insufficiency of the evidence to justify the verdict*." (Italics added.)

That section also provides that "[a] new trial shall not be granted upon *the ground of insufficiency of the evidence to justify the verdict* . . . unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences

therefrom, that the court or jury clearly should have reached a different verdict or decision." (Italics added.) It further provides that "[w]hen a new trial is granted, on all or part of the issues, *the court shall specify* the ground or grounds upon which it is granted and *the court's reason or reasons for granting the new trial upon each ground stated*." (Italics added.) It also states that if an order granting a new trial does not contain a specification of reasons, "*the court must*, within 10 days after filing such order, prepare, sign and *file such specification of reasons in writing* with the clerk[, and t]he court shall not direct the attorney for a party to prepare either or both said order and said specification of reasons." (Italics added.)

Of particular importance to the instant appeal, section 657 bars the affirmance on appeal of an order granting a new trial on the ground of insufficiency of the evidence to justify the verdict where the order fails to specify the reasons for granting the new trial:

> "*[O]n appeal from an order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict* . . . it shall be conclusively presumed that said order as to such ground was made only for the *reasons specified* in said order or said *specification of reasons*, and *such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons*." (Italics added.)

In *Mercer v. Perez* (1968) 68 Cal.2d 104, 116, the California Supreme Court held that under section 657, "if the ground relied upon is 'insufficiency of the evidence' the judge must briefly recite the respects in which he finds the evidence to be legally inadequate." The *Mercer* court explained that the order granting a new trial on this ground "must briefly identify the portion of the record which convinces the judge 'that

the court or jury clearly should have reached a different verdict or decision.'" (*Ibid.*, fn. omitted.)

The failure of a trial court to specify reasons in an order granting a new trial on the ground of insufficiency of the evidence to justify the verdict or to file a timely specific of reasons after granting such an order, as required by section 657, renders the order defective, not void, and the order cannot be affirmed on appeal on the ground of insufficiency of the evidence to justify the verdict. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 896.) However, "[t]hough noncompliance with the statute precludes our upholding the order on the basis of insufficiency of the evidence . . . , we may consider its validity *on any other statutory ground for new trial advanced in defendant's motion and supported by the record*." (*Ibid*.)

Although the noncompliance with the specification of reasons requirement of section 657 precludes our upholding of the defective order on the basis of insufficiency of the evidence, we must next inquire whether that order is valid on any other statutory ground for new trial advanced in Penaflor's new trial motion and supported by the record. (*Sanchez-Corea v. Bank of America, supra,* 38 Cal.3d at p. 896.)

II.

REMAINING GROUNDS ASSERTED IN PENAFLOR'S NEW TRIAL MOTION

The City argues that none of the remaining three statutory grounds upon which Penaflor's motion was based—irregularity in the proceedings, misconduct of the jury, and

the occurrence of an error in law[4]—warranted the granting of a new trial. Penaflor urges this court to affirm the new trial order because (1) the jury committed "abuse of discretion" by "rejecting" material evidence and disregarding the jury instructions; (2) the verdict is against the law because the jury's factual findings are inconsistent and the verdict is contrary to the instructions on defamation and unlawful employment retaliation. For reasons we now discuss, we conclude the record did not support the granting of a new trial on any of those remaining three grounds, and thus the court manifestly abused its discretion by granting Penaflor's new trial motion.

A. *Irregularity in the Proceedings and Jury Misconduct*

The record shows that in her new trial motion papers, Penaflor linked two of the remaining three statutory grounds upon which she based her motion: irregularity in the proceedings and jury misconduct.[5] In her supporting memorandum of points and authorities, which her trial counsel prepared, Penaflor argued in a subheading that "there was irregularity in the proceedings of the jury that may have constituted jury misconduct." (Original capitalization & underscoring omitted.) Under that subheading,

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4 Section 657 provides in part: "The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: [¶] 1. *Irregularity in the proceedings* of the court, jury or adverse party, *or any order of the court or abuse of discretion* by which either party was prevented from having a fair trial. [¶] 2. *Misconduct of the jury* . . . . [¶] . . . [¶] 7. *Error in law*, occurring at the trial and excepted to by the party making the application." (Italics added.)

5 The relevant text of section 657 is set forth in footnote 4, *ante*.

and relying on her trial counsel's declaration, she maintained the jury committed misconduct by reaching their verdict in favor of the City after deliberating only one hour and before they received any of the voluminous documentary evidence presented at trial. She claimed that "it would have been impossible for the jury to have considered the evidence, over 1200 exhibits, without looking at it." As already noted, Penaflor contends on appeal that the jury committed an "abuse of discretion" by "rejecting" material evidence and disregarding the jury instructions, specifically BAJI Nos. 2.04 and 2.22.

As a preliminary matter, we reject Penaflor's contention that "abuse of discretion" by a jury is a proper ground for the granting of a new trial. None of the grounds for new trial listed in section 657 refers to an abuse of discretion by a jury. The only reference to "abuse of discretion" as a ground for granting a new trial is found in the first ground—irregularity in the proceedings—and that reference is only to an abuse of discretion by the court.[6] In her new trial motion, Penaflor did not claim that an abuse of discretion by the court constituted an irregularity in the proceedings that prevented her from having a fair trial within the meaning of section 657.

Construing Penaflor's contentions as a claim that the jury's quick deliberation constituted jury misconduct, which is an authorized ground for the granting of a new trial, we conclude that neither the record not the law supports the new trial order as to this ground. Section 613 provides in part that "[w]hen the case is finally submitted to the jury, *they may decide in Court* or retire for deliberation." (Italics added.) As this court

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6 The relevant text of section 657 is set forth in footnote 4, *ante*.

explained in *Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 910, "[o]n its face, the statute—permitting the jury to decide the case in court—suggests there is nothing impermissible in simply taking a vote and rendering a verdict if the jury chooses to do so." In *Vomaska*, the jury returned their verdict in about 10 minutes, before the exhibits were delivered to them and without even discussing the evidence or the issues. (*Id.* at pp. 909, 912.) Holding that the jury's conduct did not rise to the level of misconduct depriving the plaintiff of a fair trial, we expressed our agreement with the following statement from another case:

> """While the verdict should be the result of sound judgment, dispassionate consideration, and conscientious reflection, and the jury should, if necessary, deliberate patiently and long on the issues which have been submitted to them, yet, where the law does not positively prescribe the length of time a jury shall consider their verdict, they may render a valid verdict without retiring, or on very brief deliberation after retiring, although the trial court may, in its discretion, cause the jury to reconsider the case if their decision is so hasty as to indicate a flippant disregard of their duties.""" (*Id.* at p. 913.)

Here, the record shows that, unlike the jury in *Vomaska* that returned a verdict in 10 minutes without retiring for deliberation, the jury in the instant case did retire for deliberation and returned the defense verdict after about one hour. The fact that the jury did not receive the exhibits prior to deliberating is of no moment. (*Vomaska, supra,* 55 Cal.App.4th at 909, 912.) The relevance of the exhibits was the subject of trial testimony, which the jurors heard. As already discussed, the jury was statutorily authorized to return a verdict without viewing or even discussing the exhibits. (§ 613, discussed, *ante*.)

We also reject Penaflor's contention that the jury committed an "abuse of discretion" by "rejecting" material evidence and disregarding the jury instructions, specifically BAJI Nos. 2.04 and 2.22. As a preliminary matter, we note that she failed to raise this contention in her new trial motion. The court instructed the jury under BAJI No. 2.04 as follows:

> "In determining what inferences to draw from the evidence you may consider, among other things, a party's failure to explain or to deny such evidence."

The court also instructed the jury under BAJI No. 2.22 as follows:

> "A witness false in one part of his or her testimony is to be distrusted in others. You may reject the entire testimony of a witness who wilfully [*sic*] has testified falsely on a material point, unless, from all the evidence, you believe that the probability of truth favors his or her testimony in other particulars."

Relying on the foregoing instructions and citing to the reporter's trial transcript, Penaflor contends that the jury disregarded BAJI Nos. 2.04 and 2.22. In support of this contention she maintains that (1) the testimony of personnel director Rich Snapper conflicted with that of deputy director Rea, both defense witnesses; (2) Harrison's testimony conflicted with Rea's; and (3) accounting supervisor Teresita del Rosario provided contradictory testimony. Penaflor did not argue these points in her new trial motion or during oral argument below, and she may not properly do so for the first time on appeal. In any event, the determination of the credibility of the witnesses who testified at trial is within the exclusive province of the jury. We conclude the record did not support the granting of a new trial on the grounds of irregularity in the proceedings or jury misconduct.

B. *Verdict Against Law*

Penaflor also maintains the court properly granted a new trial because the jury's defense verdict was "against law" within the meaning of section 657, subdivision 7[7] for two reasons. First, she claims that the verdict is against law because the jury's findings are inconsistent. Second, she asserts the verdict is against law because the verdict is contrary to the instructions on defamation and retaliation. We reject these contentions and conclude the record did not support the granting of a new trial on the ground the jury's unanimous defense verdict was "against law."

As a preliminary matter, we note that "[i]n contrast to the grounds of insufficient evidence and excessive or inadequate damages, 'the phrase "against law" does not import a situation in which the court weighs the evidence and finds a balance against the verdict, as it does in considering the ground of insufficiency of the evidence.' [Citation.]" (*Sanchez-Corea v. Bank of America, supra,* 38 Cal.3d at p. 906.) A verdict is "against law" only if it is "'unsupported by any substantial evidence, i.e., [if] the entire evidence [was] such as would justify a directed verdict against the part[ies] in whose favor the verdict [was] returned.' [Citations.]" (*Ibid.*)

1. *Claim that the jury's findings are inconsistent*

In her three-sentence argument on appeal, Penaflor contends the verdict is against law because the jury's findings are inconsistent. She states: "Two scenarios were presented before the jury. Penaflor's claim that she was terminated by Mary Dixon and

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7 The relevant text of section 657, subdivision 7 is set forth in footnote 4, *ante*.

Elbert Harrison and the City's claim that Penaflor was failed on probation. The jury believed that the City failed Penaflor on probation, which made Harrison's publication of the statement that he fired Penaflor a 'false' publication."

In her new trial motion, Penaflor asserted that she had presented uncontradicted evidence by two parking enforcement supervisors that Harrison had stated he had "fired" her. That assertion was premised, however, on the presupposition that those two witnesses were credible and that the jury believed their testimony. Jurors are "the sole and exclusive judges of the believability of the witnesses and the weight to be given the testimony of each witness." (BAJI No. 2.20.) Here, the jury had the power, and the absolute right, to disbelieve the testimony of the witnesses in question. Penaflor does not cite to the record, and her contention appears to be based on speculation as to which "scenario" the jury believed. The judgment on special verdict in this matter shows that the special verdict form did not require the jury to determine whether Penaflor's employment was terminated or whether she was failed on probation. She has presented no persuasive reason to conclude the jury could not have found she was terminated for a lawful reason, such as her inability to fit in to the work environment at parking management, as to which parking management personnel gave substantial testimony at trial.

2. *Claim that the verdict is contrary to the instructions on defamation and retaliation*

i. Defamation

Penaflor maintains that Harrison made two statements that were defamatory. First, she claims for the first time that Harrison defamed her by accusing her of taking checks and keeping credit card numbers in her desk. She made no such allegation in her operative second amended complaint. The reporter's transcript shows that in response to a question by the City's trial counsel during cross-examination as to whether Harrison was a thief, Penaflor stated nonresponsively: "Harrison accused me of taking checks and keeping credit card numbers in my desk, and I can't stand here in public and call somebody a thief." Penaflor's evasive statement during cross-examination did not relate to the defamation allegations in her operative pleading.

Second, Penaflor claims that Harrison defamed her when he told Dixon and a parking enforcement officer that he had fired her. At trial, Harrison denied stating that he had fired Penaflor. As already discussed, the jurors were the sole and exclusive judges of the believability of the witnesses in question and the weight to be given to their testimony. (BAJI No. 2.20.) Here, the jury had the power and the absolute right to disbelieve the testimony of the witnesses in question.

ii. Retaliation

The record also does not support Penaflor's claim that she suffered unlawful employment retaliation in violation of Labor Code section 1102.5, California's so-called "whistleblower" statute. (*Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236,

237.) The jury was instructed with a modified version of BAJI No. 12.10, which sets forth the five essential elements of such a claim.[8] The record shows that Penaflor did not satisfy the second essential element, which under the court's instructions required proof that she "disclosed information to a *government or law enforcement agency*, where she had reasonable cause to believe that the information disclosed a *violation of state or federal statute, or violation or noncompliance with a state or federal regulation*." (Italics added.) She admits on appeal that she made her disclosures to a nonsupervisorial coworker, Harrison; to her supervisor, Dixon; and to the accounting supervisor, Teresita del Rosario. None of these individuals qualified as a "government or law enforcement agency" within the meaning of BAJI No. 12.10. Penaflor's reliance on *Gardenhire v. Housing Authority, supra,* 85 Cal.App.4th 236, is unavailing, because the plaintiff in that case reported the alleged improprieties involving her supervisor directly to the commissioners of the housing authority. (*Id.* at p. 240.) Affirming a judgment entered in

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8 The court gave the following modified version of BAJI No. 12.10 (1997 New): "The essential elements of a claim for unlawful employment retaliation under Labor Code section 1102.5 are: [¶] 1. [Penaflor] was an employee of [the City]; [¶] 2. [Penaflor] disclosed information to a government or law enforcement agency, where she had reasonable cause to believe that the information disclosed a violation of state or federal statute, or violation or noncompliance with a state or federal regulation; [¶] 3. [The City] subjected [Penaflor] to an adverse employment action; namely failure of probation and/or constructive termination and/or actual termination; [¶] 4. [Penaflor's] disclosure of information was a motivating factor for the [City's] adverse employment action; and [¶] 5. [The City's] action caused [Penaflor] injury, damage, loss, or harm. [¶] Acts of retaliation include demotion, suspension, reduction, failure to hire or consider for hire, failure to give equal consideration in making employment decisions; failure to treat impartially in the context of any recommendations for subsequent employment which the employer may make, adversely affecting working conditions or otherwise denying any employment benefit."

favor of the plaintiff after a jury awarded damages under the whistleblower statute, the Court of Appeal in *Gardenhire* explained that the plaintiff "reported directly to the commissioners of a public agency which happened to also be her employer. The commissioners of the agency, themselves public employees and charged with the protection of the public interest, commenced an investigation. *Gardenhire could not have expected there was any further need to report her suspicions to higher authorities*." (*Id.* at p. 242, italics added.) In other words, the plaintiff in that case did not report the alleged improprieties to the person suspected of wrongdoing; she reported her suspicions of wrongdoing to the commissioners of the housing authority, the top echelon of that organization, who were charged with the duty of protecting the public interest. Here, Penaflor, unlike the plaintiff in *Gardenhire*, did not report her suspicions of improprieties to the top echelon of management charged with managerial responsibility over the individuals suspected of wrongdoing.

Penaflor also asserts that she satisfied the disclosure element of the statute by presenting evidence that she made a report to Sergeant Dave Swiskowski of the San Diego Police Department Internal Affairs Unit, the Office of the Inspector General, and the district attorney's office. The record shows, however, and Penaflor concedes, that she made these reports *after* her alleged termination on February 25, 2000. These reports thus could not have been a factor in any retaliatory employment action taken against Penaflor.

In light of the foregoing conclusions, we need not, and do not, reach the issue of whether the record supports Penaflor's allegations regarding the remaining essential elements of her claim of unlawful employment retaliation.

DISPOSITION

The order granting a new trial is reversed. The court is directed to vacate the order granting a new trial in this matter, enter a new order denying Penaflor's new trial motion, and reinstate the judgment. The City shall recover its costs on appeal.

NARES, Acting P. J.

WE CONCUR:

McDONALD, J.

McINTYRE, J.